IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

Nos. 300 AND 304

ADOLF AXELRATH,

Petitioner,

v.

SPENCER KELLOGG and SONS, INC.,

Respondent.

REPLY BRIEF ON BEHALF OF PETITIONER IN SUPPORT OF PETITION FOR WRITS OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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This reply brief is submitted to point out a basic misconception of fact contained in respondent's brief and to indicate the inapplicability of the authorities relied on by respondent.

Replying to Respondent's Statement of Facts

At page 2 of respondent's brief, reference is made to what is characterized as "the obvious finality of the Commissions' action" in denying approval of the sale by respondent to Lloyd Brasileiro and at page 3 the statement is made "that such request was without avail, as the Commission adhered to its ruling." The record does not support the suggestion of respondent that the Commission's ruling was final or that the Commission upon reconsid-

eration adhered to its ruling. The statements contained in respondent's brief are coupled with record references justifying the drawing of no inferences approximating the conclusions referred to. Page 61 of the record, which is cited as authority for the conclusion of "obvious finality of the Commission's action" is nothing more than a letter dated December 9, 1940, whereby respondent informed Lloyd Brasileiro of the receipt of a telegram from the Maritime Commission dated December 6, 1940, advising respondent of the denial of the application for approval of the sale, notified Lloyd Brasileiro "that said contract is hereby cancelled" and returned a check for the $100,000 down payment. The statement that the Commission "adhered to its ruling" is supported by the citation of R. 64 which is nothing more or less than respondent's letter to Lloyd Brasileiro dated December 13, 1940 again forwarding the check for $100,000 which had been rejected by Lloyd Brasileiro and returned to respondent and notifying Lloyd Brasileiro of respondent's cancellation of the contract. This letter contains the phrase "In view of the fact that we have had no further notification from the Maritime Commission of any change in their decision, we must be guided by their official denial of the application for transfer and therefore notify you again that the contract has been cancelled." The fact is that no application for rehearing was made to the Commission and the record is devoid of any evidence that the application for approval was ever resubmitted to the Commission or that any request for rehearing was ever presented. Lloyd Brasileiro wished to make further efforts to obtain the approval of the Commission as indicated in a letter of December 10, 1940 sent by its counsel to counsel for the respondent (R. 62) but respondent rejected any suggestion of further effort to obtain the Commission's approval and reiterated its "cancellation" of the contract (R. 64).

It is manifest from the record, therefore, that the Commission's action was not final, that it "adhered" to no prior ruling and that respondent in violation of the express terms of its agreement to exercise "all diligence" to obtain the Commission's approval (R. 19) actually hindered and obstructed any effort to obtain approval after December 6, 1940.

Before proceeding to discussion of respondent's Points of Law, we wish to point out that the statement at page 3 of respondent's brief "no claim has been asserted or action instituted by Lloyd Brasileiro or Moore-McCormick Lines, Inc., which clearly indicates that they have no confidence in their original position in the matter" is not only made without citation to any part of the record to justify the statement but is actually contrary to what the record shows. On December 19, 1940, Moore-McCormick Lines, Inc., wrote to respondent and demanded arbitration under the contract pursuant to its terms (R. 28-29). On December 19, 1940, respondent refused arbitration (R. 30) and on the 24th Moore-McCormick Lines wrote respondent (R. 31).

> "Your repudiation of the arbitration clause of your contract has given us a shock, not because ways of enforcement of that clause and of the contract itself are unavailable to us but because a company of high standing in the shipping world has bluntly taken such a stand."

Respondent nonetheless adhered to its arbitrary position (R. 32-33) and ignored a further request for arbitration made by letter dated January 13, 1941 (R. 34). Beyond all else, we think it quite obvious that any action or inaction on the part of Moore-McCormick Lines, Inc., can hardly have any bearing upon petitioner's rights in this case nor even be properly the subject of comment.

Replying to Respondent's "Point I"

The cases decided by this Court which are cited in Respondent's Point One are merely decisions enunciating the well-settled rules of jurisdiction of this Court to review Federal questions decided by State Courts of last resort. None of the decisions has the slightest analogy to the facts at bar either in detail or in principle. What respondent has significantly failed to do is to point out any respect in which petitioner has failed to bring himself directly within the statutory authority of this Court to review the judgments below nor has respondent in any respect whatever answered petitioner's specifications of jurisdiction or the reasons relied on for allowance of the Writs set forth in the petition for certiorari.

In the case at bar, the Shipping Act was specifically pleaded as a defense by respondent in its answer (R. 41-2) and the Courts below decided the case upon the express authority of the Federal statute (R. 74). It would be difficult to conceive of a decision by a State Court more clearly deciding a Federal question of a substantial nature than the decision of the Courts below in the case at bar. That the question is of paramount importance is unchallenged. That it has never been decided by this Court or any authoritative federal tribunal is undenied.

Replying to Respondent's "Point II"

Respondent, in its second point, has attempted to argue that the decision of the Courts below was based upon "well-settled principles of law" and, therefore, should not be disturbed. Aside from respondent's conclusion to that effect, no principles of state law are set forth under which this case could have been decided without deciding the Federal question involved. The authorities cited at page 7 of respondent's brief (cited also in the opinion be-

low, R. 75), rely expressly upon the construction of the Federal statute rendering the contract between respondent and Lloyd Brasileiro void. Respondent concedes that the condition of approval by the Maritime Commission was incorporated in the contract only because of the provisions of the Shipping Act (Respondent's brief, pp. 1-2). This concession coincides with petitioner's position that approval by the Commission was no essential part of the contract and that it was at most a burden upon respondent which respondent was obligated to perform at any time prior to the date for delivery and of which respondent was relieved from performance when the contract was assigned to Moore-McCormick Lines, Inc. The citation of the decision of this Court in *Jones* v. *United States,* 96 U. S. 24 (Rspts. Br., p. 6), merely emphasizes the validity of petitioner's argument. In that case the Court not only held that a condition precedent must be performed where it is a true condition precedent, but the Court further held that hindrance or refusal to perform by the promisee is equivalent to performance of the condition. At page 27 of the opinion the Court stated:

> "Hindrance or refusal by the other side is equivalent to performance of condition. For, where the right to demand the performance of a certain act depends on the execution by the promisee of a condition precedent or prior act, it is clear that the readiness and offer of the latter to fulfill the condition, and the hindrance of its performance by the promisor, are in law equivalent to the completion of the condition precedent, and will render the promisor liable upon his contract."

and at page 28 of the opinion just prior to the quotation at page 6 of respondent's brief, the Court indicated that it is only dependent conditions which are "of the essence of the contract" that make performance of the prior condition mandatory. In the case at bar obtaining approval of the Maritime Commission was an obligation

of performance assumed by respondent. It was not intended to be a convenient method of evasion of respondent's undertaking to sell the vessel. The condition was in no sense of the essence of the contract; it was merely the parties' recognition and acknowledgment of the statutory limitations placed upon them by the Shipping Act. The Courts below have given the Shipping Act a construction which makes the contract and in principle, all contracts requiring the consent of Federal commissions, absolutely void, and, in effect, hold that no commercial agreement can be entered into to obtain the approval of a Federal commission notwithstanding that no unlawful purpose is intended and that no violation of any Federal statute is contemplated. We think it clear that this case presents a Federal question of great importance not heretofore decided by this Court, which has been decided by the Courts below in a manner tending greatly to restrict freedom of contract in large fields of interstate and foreign commerce.

Conclusion

It is respectfully submitted that the judgments of the Court of Appeals should be reviewed by this Court and that the prayer of the petition for certiorari should be granted.

Respectfully submitted

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